

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
<http://www.montgomerycountymd.gov/boa/>

(240) 777-6600

CASE NO. A-6539

**PETITION OF T-MOBILE LLC
C/O NETWORK BUILDING AND CONSULTING, LLC**

OPINION OF THE BOARD

(Hearings Held: November 8, 2017, and December 6, 2017)

(Effective Date of Opinion: December 21, 2017)

Case No. A-6539 is an application by Petitioner T-Mobile LLC, c/o Network Building and Consulting, LLC, for a variance to allow the proposed construction of a telecommunications facility on a building in a Residential Detached Zone that is 45 feet, 6 inches (45' 6") in height. Section 59-3.5.14.C.2.d(ii)(a) of the Zoning Ordinance allows for the installation of an antenna and related unmanned equipment building or cabinet on a rooftop in a Residential Detached zone on privately owned land if the building is a minimum height of 50 feet.

The Board of Appeals held hearings on this application on Wednesday, November 8, 2017, and on Wednesday, December 6, 2017. Edward Donohue, Esquire, appeared on behalf of the Petitioner, as did Timothy Dwyer, Zoning Manager with Network Building and Consulting, also representing T-Mobile, and Jeffrey Berger, COO, National Capital Area Council of the Boy Scouts of America. All three were present at both hearings. Abutting property owner Sukhwant Shinkaveg testified in opposition to the application at the November 8, 2017, hearing. Her husband, Brian Shinkaveg, testified in opposition to the requested variance at the December 6, 2017, hearing, along with Alper Ozinal, Cecile Lorillou, Elodie Sprung, Rhonda Trad, and Gary Nuhn.

Decision of the Board: Variance **GRANTED**.

EVIDENCE PRESENTED

1. The subject property is Parcel N340, 0501 Subdivision located at 9190 Rockville Pike, Bethesda, MD, 20814, in the R-60 Zone.

2. The Petitioner is seeking variance relief "to allow it to collocate its antennas on the rooftop of an existing, non-residential building." The Petitioner is a lessee of the property, which is owned by the National Capital Area Council Boy Scouts of America. Network Building and Consulting, LLC, is the lessee's agent. See Exhibit 3.

3. The Statement submitted with the application indicates that the subject property is approximately 77,694 square feet in size, and is improved with a three-story building which is 45 feet, six inches (45' 6") in height. There is an existing screen wall on top of the building that conceals the HVAC units and other mechanical equipment from view. With the screen wall, the total height of the building is 55 feet, six inches (55' 6"). See Exhibit 3.

4. The Statement describes the area surrounding the property as follows:

The area surrounding the Property is evenly mixed between residential and institutional uses. Directly east of the Property is land for storm water runoff. To the southeast of the Property is the Stone Ridge School of the Sacred Heart, a pre-K through grade-12 Catholic school for girls. To the south of the property is the National Institutes of Health. To the west of the Property are single-family dwellings, separated by a dense tree-line that obscures view. To the north and northeast of the Property are semi-detached, single-family dwellings. Buffering between these dwellings and the Property are the Property's parking lot and more trees.

See Exhibit 3. The Petitioner asserts in the Statement that the proposed development "is substantially in conformance with the established traditional development pattern of the neighborhood" because:

Rockville Pike is a high-traffic corridor with many travelers, including regular commuters to the National Institutes of Health and the Stone Ridge School of the Sacred Heart. The proximity of two very dense uses, as well as moderate density residential development, has resulted in progressive growth that has created additional need for Applicant's services. Applicant's request is a response to the "development pattern" that the Zoning Code contemplates occurring that requires variance relief.

See Exhibit 3. The Petitioner's Statement further indicates the "nearby institutional landowners were evaluated but deemed unsuitable for siting Applicant's facility," and that the 35 foot height limit in the R-60 Residential Zone results in a lack of options with sufficient height to allow a by-right installation of the proposed antennas.

5. The Petitioner indicates that it is not responsible for the condition of the property or its R-60 zoning, the existing rooftop coverage, or the demand by the Petitioner's

customers for improved service reliability. The Petitioner's Statement indicates that the subject property was selected because of its "optimal location" and the "infeasibility of surrounding properties." It further indicates that the antennas will be positioned at the "minimum height required to function effectively," will be painted, and will be sited "against an existing rooftop screening wall" to minimize visibility. Finally, the Statement asserts that "[w]ithout variance relief, no telecommunications facility may be installed, resulting in poorer phone and internet coverage for those residents, employees, and visitors who may rely on the Applicant's wireless service as their primary method of communication." It asserts that collocation on an existing building would be less distracting than construction of a new tower. See Exhibit 3.

6. With respect to compliance with the Bethesda-Chevy Chase Master Plan, the Statement notes that the objective of that plan is to maintain the residential character of the neighborhood. The Statement asserts that the proposed collocation would not detract from the residential character of the neighborhood, would not introduce a new primary use to the land, and would "facilitate" its subscribers who work at or visit the neighboring institutional uses (NIH and the Stone Ridge School). See Exhibit 3.

7. The Petitioner's Statement indicates that variance relief will not be adverse to the use and enjoyment of abutting or confronting properties, as follows:

As can be seen on the simulation photos attached, granting the Applicant's variance relief will not be adverse to the use or enjoyment of the neighboring properties. The antennae are sited along an existing rooftop screen wall, such that antennas will only stick up an additional two or four feet. Visually, the antennas can be made to blend into the existing environment through paint matching and siting the antennas as closely as mechanically feasible and reasonable to the existing rooftop fence, minimizing their appearance.

Neighboring parcels will have only a minimal view of the Applicant's antenna facility. Antennas are sited on the eastern portions of the existing screen wall along Rockville Pike and will not be visible from residential neighbors to the west. Neighbors to the north and northeast will have a negligible view during periods when the extensive, existing tree coverage, that otherwise obstructs the views, has fallen. Immediately east of the property is undeveloped land owned by Maryland-National Capital Park and Planning, which serves as a buffer between Stone Ridge School of the Sacred Heart and the residential dwellings north of it. Both the National Institutes of Health campus and the Stone Ridge School of the Sacred Heart, located to the south and southeast, are sited away from the Applicant's land and have their own extensive visual buffers that minimize or obviate view of the Applicant's land. Given the antennas' minimal size in comparison to the existing building's bulk, granting variance relief will have no impact on surrounding properties.

See Exhibit 3. The record contains letters of opposition from residents of two neighboring properties on Benton Avenue. See Exhibits 10(a) and (b). It also contains five letters of support, one of which is from the Berger family, who reside in the Locust Hills neighborhood across Rockville Pike from the subject property, and the balance of which are from persons living outside of the immediate area (one lives in the Wyngate neighborhood (also in Bethesda but somewhat removed from the subject property), one in Silver Spring, one in Rockville, and one did not disclose his address). See Exhibits 9(a)–(e).

November 8, 2017, Hearing

8. At the November 8, 2017, hearing, Mr. Edward Donohue noted that the Tower Committee had reviewed the technical aspects of the Petitioner's application and recommended approval. He stated that the Petitioner had worked with the County's Department of Permitting Services to establish the scope of the variance(s) needed. He stated that in 1996, when the 50-foot height requirement from which his client is seeking relief was established, it was a somewhat arbitrary benchmark, since telecommunications companies at that time were placing antennas on very tall (150-170 foot) towers/monopoles, not on rooftops. He explained that the technology has evolved since that time, and that companies now want to collocate their antennas on rooftops which are only 50 feet, sometimes less.

Mr. Donohue asserted that the subject property is unique. He stated that it fits the Petitioner's need for coverage. He explained that the screen wall on the roof of the existing building will hide the proposed installation, which he said would be "very unobtrusive," and that the Tower Committee was satisfied with the Petitioner's choice of location. Mr. Donohue stated that the roof coverage already exceeds the 25% limit imposed by the Zoning Ordinance, and that the proposed antennas and equipment cabinet would result in a slight increase to that coverage. He asserted that the proposed installation would fit the established development pattern of the neighborhood, noting that the property is residentially zoned, but that it contains a long-standing institutional use and is along a very busy commercial corridor (Rockville Pike). He later argued that the property is extraordinary because it contains an existing institutional building with an established height in a residential zone, and that it is the development of the property that is causing the problem.

In response to the testimony from Ms. Sukhwant Shimkaveg (recounted in paragraph 11), Mr. Donohue stated that the question of radio frequency ("RF") emissions comes up all the time when antennas are proposed, and that in response to a question that was raised when the Petitioner met with the nearby Bethesda Crest Homeowners Association, the Petitioner had a report prepared by EBI Consulting about the proposed installation. See Exhibit 12. He stated that the Federal Communications Commission

("FCC") is charged with setting radio frequency emission standards, and that the Board is preempted from deciding this matter on those grounds.

9. Mr. Timothy Dwyer testified that the existing Boy Scout building is on an odd piece of land. He testified that the slope of the property causes one side of the building to measure 35 feet tall, and the other to measure 45 feet tall; he stated that the engineers on the Tower Committee had used the taller side when considering this application. Mr. Dwyer testified that the proposed antennas would be on an existing mechanical screen wall, and that the existing screen wall is not counted when determining the height of the existing building, noting that if the screen wall had been counted towards the building's height, a variance would not be needed. Mr. Dwyer testified that the proposed antennas would extend over the screen wall, and that if a taller wall were needed, they could replace the existing screen wall with one made of material that allowed for transmission of radio frequency emissions.

Mr. Dwyer testified that a consultant was hired to address the questions raised by residents of Bethesda Crest, which is due north of the subject property, and he read from the report prepared by that consultant. See Exhibit 12. He testified that the maximum predictive radio frequency emissions at the exterior of the nearest house to the north of the subject property were .24% of the maximum permissible exposure limits established by the FCC for the general population, or approximately 417 times below the FCC limits. He then testified that inside of that house, the exposure would be reduced by 50 percent to .12% of the FCC's maximum permissible exposure limit (834 times below that limit). Mr. Dwyer testified with respect to the wattage of the proposed antennas that they would be approximately 95 watts, 143 watts, and 95 watts, characterizing this as "not very high powered." He testified that the wattage and frequency of the proposed antennas is far below what is allowed under the FCC limits.

Mr. Dwyer testified that the Petitioner had explored other sites to meet their coverage needs. He testified that the Stone Ridge School of the Sacred Heart was not a feasible option because of the topography, tree cover, and roof space available at that site. He testified that he had made several inquiries about leasing space on the federal land across from the Boy Scouts' building (the National Institutes of Health), which has numerous tall buildings, but that the federal government was not interested in giving the Petitioner access to their buildings.¹ He testified that the Boy Scouts' building was one of the only viable non-residential buildings in the area. He stated that the fact that it already had a screen wall on top was a mitigating factor and was beneficial, because antennas could be mounted to it with an aesthetically pleasing result. He noted that the antennas would be painted to match what they were attached to. He testified that the

¹ Mr. Donohue later clarified that there are "dozens of antennas" on the rooftop of the NIH property, and thousands of antenna sites on federal land, adding that the General Services Administration actually has a program "encouraging location of antennas on Department of Labor, on federal governments and the national enclaves throughout the federal properties." See 11/8/17 Transcript, page 28.

Boy Scouts' building is a commercial building in a residential zone, and that the minimum building height for the collocation of antennas in commercially-zoned areas is only 30 feet.

Mr. Dwyer testified that the photo simulations submitted with the variance application show that the proposed antennas will be shielded from view. See Exhibits 5(g)-(i).

10. Mr. Jeffrey Berger testified that the proposed antennas would be pointed out over Rockville Pike and not into any living rooms or the Boy Scouts' offices. Indeed, he testified that Naval servicemen who are on the Boy Scouts' staff have indicated that the proposed antennas likely will not enhance the telecommunications service in their offices because the antennas are pointed out over Rockville Pike. Finally, Mr. Berger testified that he lives just across Rockville Pike from the subject property, in Locust Hills Estates, and that the antennas will be pointed towards his house. He testified that he notices when the Notice sign advertising the requested variance falls down because it is along his daily commute, and that when he sees it down, he puts it back up.

11. Ms. Sukhwant Shimkaveg, who resides on Cedar Way in property abutting the subject property, testified in opposition to the application. Ms. Shimkaveg first indicated that her husband, who is a nuclear engineer, trained in the effects of radiation and the safety measures imposed to protect the public from improper exposure, had intended to testify, but that he was unable to attend the hearing due to illness. She then proceeded to read a prepared statement.

Ms. Shimkaveg testified that no antenna or cell tower should be located on the top of the Boy Scouts' building. She testified that her husband is a nuclear engineer, and is aware of the need for protections from radiation. She testified that ionizing radiation causes cancer from the destruction and/or mutation of cell DNA, explaining that damaged or destroyed cells cause cancer, and that damaged cells can live to replicate providing a pathway to cancer growth. Ms. Shimkaveg testified that children are more heavily impacted by radiation because their cells are replicating at a faster rate, and that while gamma and x-ray radiation are more powerful, high-powered RF sources at very close range remain a significant concern. She testified that her children would be directly exposed to the radiation from the proposed antennas.

Ms. Shimkaveg explained that time, distance, and shielding all affect radiation's effects. She testified that cell phones are low emitters, and that headphones further reduce exposure. She testified that cell towers are high-powered radiation sources regardless of the spectrum emitted, and that their tall height is intended to increase the distance from the source of the radiation. Ms. Shimkaveg testified that her house is on a hill directly behind the Boy Scouts' building, 50 feet from its rooftop, such that the second floor of her home is approximately 10 feet below the rooftop of the Boy Scouts' building.

She testified that if the variance were to be granted, it would erode the health protection offered by the statutorily-required distance (i.e. 50 foot height requirement), and would greatly affect her family's well-being. She testified that her spouse and her children would receive radiation from the proposed antennas 24 hours a day, seven days a week. She testified that the installation of the proposed antennas would impact the value of her home. She testified that the houses around the Boy Scouts' building are elevated relative to that building, such that her kitchen looks at the second floor of the Boy Scout building.

Ms. Shimkaveg testified that there are lots of children in the neighborhood surrounding the subject property. She testified that Bethesda Crest is a small group of apartments, and questioned why the Petitioner had not reached out to the Maplewood Homeowners Association, of which she is a part. Finally, she drew a distinction between the weekday, work-hour exposure that persons employed by the Boy Scouts would receive, and the all-day, everyday exposure to which her family would be subjected. She implied that there was a reason that the federal government was not interested in having the proposed installation on their property.

December 6, 2017, Hearing

12. At the December 6, 2017, hearing, Mr. Donohue stated that the Petitioner had submitted a letter which indicated that the proposed antennas would meet the standards established by the Federal Communications Commission for radio frequency emissions. See Exhibit 12. He reiterated that when compliance with the FCC standards is demonstrated, the Board is preempted from regulating the placement of antennas based on radio frequency emissions.

Mr. Donohue asserted that the subject property is unique in that it is a commercial use that has existed in this R-60 Residential Zone since 1969. He stated that in accordance with the requirements governing antennas, the proposed antennas could be placed by right on this building if it were in any other zone, because the Zoning Ordinance only requires that buildings in other zones be 30 feet in height for collocation. Mr. Donohue stated that the screen wall on the top of the existing building also renders this property unique, and will hide much of the equipment. He asserted that these factors render the property unique for the purposes of the standard in Section 59-7.3.2.E.2.a.i of the Zoning Ordinance. He later argued that the size of the Boy Scouts' building relative to the buildings on the surrounding streets or neighborhood, and the fact that the Boy Scouts' building is located at a busy intersection along Rockville Pike which does not have many single family houses, constitute an "extraordinary situation" pertaining to the subject property, in satisfaction of Section 59-7.3.2.E.2.a.i of the Zoning Ordinance.

Mr. Donohue stated that the height of the existing Boy Scouts' building is not a result of any actions taken by the Petitioner. He asserted that the requested variance is the minimum necessary to overcome practical difficulties and allow the Petitioner to

provide good coverage in this area since the Petitioner has been unable to secure permission from other neighboring owners or their properties were unsuitable. He stated that while the Master Plan is silent with respect to the location of antennas, the Tower Committee urges collocation in lieu of new towers. Mr. Donohue stated that the installation of the proposed antennas will not be adverse to neighboring property owners, indicating that they will have improved service, and that the design and photo-simulations show no adverse effects on adjacent and confronting properties. See Exhibits 3 and 5(g)-(i).

13. Mr. Dwyer testified that the proposed development conforms with the established or traditional development pattern of the street or neighborhood, in satisfaction of Section 59-7.3.2.E.2.a.v of the Zoning Ordinance. In support of this, he highlighted for the Board examples of similarly situated, busy intersections in the County that are lined with commercial or office development which serves as a buffer for the R-60 or R-90 zoned residential properties behind. By way of example, Mr. Dwyer mentioned the intersections of Connecticut Avenue and Newdale Road, Colesville Road and University Boulevard, Frederick Road and Middlebrook Road, and Montgomery Village Avenue and Centerway Road. He provided maps and photographs of these intersections, and noted that antennas could be collated by right on the buildings at these other intersections. See Exhibit 13. He further testified that the subject property is approximately 77,000 square feet, which is much larger than the surrounding residential properties. He testified that this is in keeping with a pattern in the County of large corner properties at busy intersections being utilized to buffer smaller, neighboring residential lots.

Regarding the impact of the proposed installation of neighboring properties, Mr. Dwyer testified that the existing screen wall will mitigate the appearance of the antennas, and that the Bethesda Crest Homeowners Association was pleased with the photo-simulations. He testified that the height of the existing building, with the screen walls, is over 50 feet, and reiterated his earlier testimony that in multifamily zones, antennas can be located on buildings that are only 30 feet tall.

14. Mr. Brian Shimkaveg stated that he objects to the grant of the requested variance, and that he has a petition signed by 35 persons who also oppose the grant of this variance. See Exhibit 14.

Mr. Shimkaveg testified that he is a trained nuclear engineer, and, after detailing his work experience, indicated that he considers himself an expert in radiation protection and safety. He stated that while the Board cannot consider radio frequency emissions, the Board should be considering the fact that allowing the installation of the proposed antennas on a building that is a lower height than would otherwise be required by the Zoning Ordinance is really allowing a safety limit for an RF transmission source to be moved, and would have the effect of moving this source of radiation closer to residents than would otherwise be allowed. He testified that radiation breaks down cells which in

turn causes cancer. He testified that his children will be affected by the radiation that the proposed antennas will emit.

Mr. Shimkaveg testified that time, distance, and shielding all impact radiation exposure. He testified that for cell phones, which emit radiation, a person can minimize exposure by limiting the time spent on the phone and by increasing the distance between the phone and the head through the use of a peripheral device. He indicated that the limited battery life of cell phones also serves to limit exposure. He testified that cell tower antennas are high-powered radiation sources, and that height restrictions, such as the restriction from which the Petitioner is seeking variance relief, are used to create the distance needed for safety. Mr. Shimkaveg testified that the proposed antennas will broadcast horizontally to provide wide signal distribution. He testified that his house is located only 50 feet horizontally from the rooftop on which the antennas are proposed to be located, and that the second floor of his house, where his bedroom and office are, is only ten (10) vertical feet from that rooftop. He provided the Board with photographs showing this proximity, and suggested that it is a significant departure from the protections in the Zoning Ordinance. See Exhibit 15. Mr. Shimkaveg testified that any variance to the protective height standard would greatly affect his family's well-being. He testified that his family would receive radiation from the proposed antennas 24 hours a day, seven days a week, 365 days a year. He asserted that the variance sought is from safety standards for RF-transmitting devices, that it will affect his family's personal safety, and that the decision before the Board is not a minor decision. He further testified that the installation of these antennas will have a devastating economic impact on his home.

Mr. Shimkaveg testified that there are other suitable locations for the installation of the proposed antennas, including the National Institutes of Health (1/4 mile south), Navy Medical (1/2 mile south), a WSSC water tower (1 mile west, on Cedar Lane), the new Flats 8300 high rise (1 mile south), and the Stone Ridge School. He testified that the subject property is in a natural valley, which may necessitate stronger transmissions than would be needed at a higher elevation. He testified that the location of one carrier on the roof of the Boy Scouts' building would invite other carriers to collocate on that rooftop, increasing exposure and further reducing safety standards.

15. Mr. Alper Ozinal, whose property is across Cedar Way from the Shimkavegs, testified that he shares the concerns voiced by Mr. Shimkaveg, characterizing those concerns as very serious, particularly for nearby residents such as himself. He testified that he also has serious concerns about the impact of the proposed antennas on property values, testifying that he just purchased his home last year.

16. Ms. Christabelle Salmon, whose property is also across Cedar Way from the Shimkavegs, abutting the Ozinals' property, testified that the proposed antennas constitute a health threat to the community, and are a violation of her residential environment, safety, and quality of life. She testified that the proposed use is

unacceptable, and would alter the residential zoning of the area. She implored the Board to protect her community.

17. Ms. Cecile Lorillou, who lives on Benton Avenue in close proximity to the proposed antennas, testified that she opposed the proposed antennas and supported the arguments made by Mr. Shimkaveg. She stated that her husband had submitted a letter opposing to the grant of the proposed variance. Ms. Lorillou testified that she is concerned about the health effects of the proposed antennas, and that there are many others in the neighborhood who share these concerns. She testified that she has reviewed many studies pertaining to the health effects of these antennas, and believes that they are adverse to human health. She testified that she has two children about whom she is concerned. Finally, Ms. Lorillou testified that she works from her home, that she has T-Mobile, that she has no problems with her phone or internet service, and that there is no need for the proposed antennas.

18. Ms. Elodie Sprung, who lives on Benton Avenue in close proximity to the location of the proposed antennas, testified in opposition to the grant of this variance. She testified that she is a mother, that she works from home and is therefore home all day, and that she is happy with her current cell phone and internet service. She testified that one of her children has autism, that radio frequency emissions affect autism, and that one of the treatments her family is currently using to treat this child's condition is a reduction in his exposure to radiation. She testified that with this reduction in exposure, her child's condition has been improving, and that she does not want to see him regress. She testified that she is very concerned about the possibility that an additional source of radiation might be located so close to her home.

19. Ms. Rhonda Trad, who lives on Cedar Way, testified that she has five children and that she shares the health concerns voiced by her neighbors. She stated that she did not receive written Notice of the variance hearing, and that she was accordingly not well prepared.² She testified that she is not proficient in radio frequency emissions, but stated that if the emissions from the proposed antennas conform to the FCC standards, the community should be educated about that. She then asked if there would be any monitoring in the future to ensure continued compliance with the FCC standards.

20. Mr. Gary Nuhn testified that he has lived on Cedar Way, on property abutting the Boy Scouts' property, for fifty years, adding that he remembered when the special exception for the Boy Scouts was granted. He asserted that this is a residential area, and that the Boy Scouts' building is the only commercial building in the area. He questioned the Petitioner's assertion that the Boy Scouts' building was the only viable location for these antennas, noting that it was located at a low point in a stream valley for a feeder branch to Rock Creek. He observed that the National Institutes of Health, located

² Because Ms. Trad's property does not abut or confront the subject property, the Board was not required to send her written Notice of the hearing. See Section 59-7.5.2 of the Zoning Ordinance.

immediately south of the subject property, is one of the largest properties in the County. He questioned how other carriers can provide service in this area, and noted that the Cedar Lane water tower, which is located at a high point topographically, has several antennas affixed to it.

21. In response to statements made by Mr. Nuhn and others, Mr. Dwyer testified that T-Mobile chooses locations for its antennas based on coverage gaps, and that the use of data is what stresses networks. He testified that as a result, sites are getting closer together and lower to the ground to address capacity issues. He testified that the Stone Ridge School was considered as a possible location for these antennas, but that it has too many tall trees and no good roof space. He testified that they had looked into placing the proposed antennas on the NIH or Navy Medical properties, but were not given access to those sites. He testified that the water tower is a mile away, and would not fill this particular coverage gap, adding that T-Mobile has installations on many WSSC water towers.

Mr. Dwyer testified, using Exhibit 4, that the proposed antennas would be located approximately 180 feet from the closest houses, and that the orientation of the antennas is away from those houses. See Exhibit 5(d). He then noted that the proposed antennas would all be located on the Rockville Pike (east) side of the Boy Scouts' building, and that one antenna array would be aimed north, up Rockville Pike, one east, across Rockville Pike, and the third south on Rockville Pike. He testified that the intent was to cover this area of Rockville Pike, and that RF energy dissipates over distance. He concluded that the subject property was unique in terms of its use, location and size.

22. In response to Mr. Dwyer's testimony, Mr. Shimkaveg testified that while transmission is generally directional, even the most tightly focused transmission has side lobes and back lobes in addition to the main lobe (i.e. the lobe where the transmission is focused). He stated that the fact that T-Mobile was not able to locate on nearby federal property should not make the location of the proposed installation his neighborhood's problem, and testified that there are alternate locations along Rockville Pike between Grosvenor and the new Flats 8300. He testified that no calls are dropped along this stretch of road, and that there is no need for the proposed antennas.

23. Mr. Donohue clarified on rebuttal that in Montgomery County, determinations of need for new antennas are vetted through the Tower Committee, stating that that Committee works to find appropriate properties for the location of antennas, and that it is before the Committee that any debate on the appropriateness of a selected location should occur. He noted that the carriers are all in competition with one another, and are all dealing with capacity issues resulting from customer demand. He noted that at some point in the past, Verizon had approached the Petitioner about collocating antennas on their property, but that that did not work out. Finally, he reminded the Board that they are preempted from considering the effects of radio frequency emissions from the proposed

antennas, and that if the Boy Scouts' building were 50 feet tall, the proposed antennas could be installed by right. He concluded that the Petitioner has met the standard for the grant of a variance.

FINDINGS OF THE BOARD

The Board notes as a preliminary matter that it is not permitted to consider the effects of radio frequency emissions from the proposed antennas, provided those emissions comply with the Federal Communications Commission's regulations. See 42 U.S.C. 332(c)(7)(B)(iv). The Petitioner has submitted a report demonstrating that the emissions from the proposed antennas will meet the FCC regulations, and Mr. Dwyer has testified to that fact. See Exhibit 12.

Based on the Petitioner's binding testimony and the evidence of record, the Board finds that the requested variance can be granted. The variance complies with the applicable standards and requirements set forth in Section 59-7.3.2.E of the Zoning Ordinance, as follows:

1. *Section 59.7.3.2.E.2.a. one or more of the following unusual or extraordinary situations or conditions exist:*

Section 59.7.3.2.E.2.a.i -- exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;

The Board finds that the subject property is located at the corner of Rockville Pike and Cedar Lane, a very busy intersection with non-residential/institutional uses at three of its four corners (The National Capital Area Council of the Boy Scouts of America, the National Institutes of Health, and the Stone Ridge School of the Sacred Heart). The Board further finds that at 77,694 square feet in size, the subject property is significantly larger than most properties in the R-60 Zone. The Board finds that the subject property is improved with a three-story building which is not used residentially, but rather as an eleemosynary and philanthropic institution (the "Boy Scouts' building").³ The Board finds that the use of the properties abutting the subject property is residential in nature, and thus finds that the non-residential nature of the subject property, coupled with its location abutting residential properties at a busy intersection whose corners are three-quarters occupied by non-residential/institutional uses, constitutes an unusual or extraordinary condition peculiar to this property. In addition, because the Zoning Ordinance limits structures in the R-60 Zone to 35 feet in height, the Board finds that the 45 foot, six inch (45' 6") height of the Boy Scouts' building is unusual. The Board finds that this combination of factors constitutes an extraordinary condition peculiar to the subject property.

³ See Board of Appeals' Case No. CBA-2640, granted in 1969 to The National Capital Area Council, Boy Scouts of America.

2. *Section 59.7.3.2.E.2.b the special circumstances or conditions are not the result of actions by the applicant;*

The Board finds that the Petitioner is not responsible for the height of the existing building, for its non-residential use, or for its location at a busy corner with other non-residential uses in a Residential Detached zone, surrounded by residential properties. Thus there is no evidence in the record to suggest that the Petitioner created the special circumstances pertaining to the property.

3. *Section 59.7.3.2.E.2.c the requested variance is the minimum necessary to overcome the practical difficulties that full compliance with this Chapter would impose due to the unusual or extraordinary situations or conditions on the property;*

The Board finds that the Tower Committee has reviewed the technical aspects of the Petitioner's application and recommended approval at this location, conditioned on the grant of any necessary variances and/or conditional use approvals. See Exhibit 3(a). In addition, the Board finds that the Petitioner has investigated other possible locations to provide the needed coverage, and that for various reasons, none works. The Board finds that the Boy Scouts' building is 45 feet, six inches (45' 6") in height, and has an existing screen wall on its roof which, if it were to have been included in the height measurement, would have increased the height of this building to 55 feet, six inches (55' 6"), five and a half feet taller than the 50-foot height at which the proposed antennas could be collocated on this building by right. Thus this existing building, unusual in its location and non-residential nature, and tall for the R-60 zone, is technically not tall enough to allow the by-right collocation of antennas because of its location in a Residential Detached Zone. The Board notes at this juncture that collocation would have been allowed on this building by right if it were located in the Residential Multi-Unit, Commercial/Residential, Employment, or Industrial zones, all of which allow collocation on buildings that are 30 feet in height. See Section 59-3.5.14.C.2.d.ii.b of the Zoning Ordinance. Accordingly, the Board finds that the requested variance, necessary for the Petitioner to locate antennas that the Tower Committee has determined are needed for adequate coverage and to allow antennas which would have been allowed by right if the existing screen walls were counted towards the height of the existing building or if the building were located in one of the afore-mentioned zones, is the minimum necessary to overcome the practical difficulty that compliance with the Zoning Ordinance would otherwise impose due to the unusual location and height of this non-residential property in a Residential Detached Zone.

4. *Section 59.7.3.2.E.2.d the variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan;*

The Board finds that the proposed collocation will not change the primary use of the subject property, and will not detract from the residential character of the surrounding neighborhood because of its minimal visibility. See Exhibits 3 and 5(g)-(i). Thus the Board finds that the proposed installation can be granted without substantial impairment to the intent and integrity of the Bethesda-Chevy Chase Master Plan.

5. *Section 59.7.3.2.E.2.e granting the variance will not be adverse to the use and enjoyment of abutting or confronting properties.*

The Board finds that the photo-simulations submitted with the variance application corroborate the assertions made in the Petitioner's Statement, that the proposed installation will be only minimally visible because of the existing screen wall. See Exhibits 3 and 5(g)–(i). As noted above, the Petitioner's Statement indicates that variance relief will not be adverse to the use and enjoyment of abutting or confronting properties because the antennas will be sited along an existing rooftop screen wall, will only protrude an additional two or four feet above that wall, and can be made to blend into the existing environment through paint matching and siting the antennas as closely as mechanically feasible and reasonable to the existing screen wall. As previously recounted, the Statement indicates that:

Neighboring parcels will have only a minimal view of the Applicant's antenna facility. Antennas are sited on the eastern portions of the existing screen wall along Rockville Pike and will not be visible from residential neighbors to the west. Neighbors to the north and northeast will have a negligible view during periods when the extensive, existing tree coverage, that otherwise obstructs the views, has fallen. Immediately east of the property is undeveloped land owned by Maryland-National Capital Parks and Planning, which serves as a buffer between Stone Ridge School of the Sacred Heart and the residential dwellings north of it. Both the National Institutes of Health campus and the Stone Ridge School of the Sacred Heart, located to the south and southeast, are sited away from the Applicant's land and have their own extensive visual buffers that minimize or obviate view of the Applicant's land. Given the antennas' minimal size in comparison to the existing building's bulk, granting variance relief will have no impact on surrounding properties.

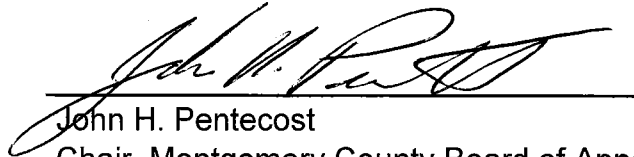
See Exhibit 3. Thus the Board finds, based on the limited visibility of the proposed installation, and because it cannot consider the effects of radio frequency emissions from the proposed installation, that granting the variance will not be adverse to the use and enjoyment of abutting or confronting property owners. With respect to the assertions that the installation of the proposed antennas will impact the value of neighboring homes, the Board finds no evidence in the record to support these assertions, and therefore cannot make this finding.

Accordingly, the requested variance for relief from Section 59-3.5.14.C.2.d(ii)(a) of the Zoning Ordinance, to allow the construction of a telecommunications facility on a building in a Residential Detached Zone that is less than 50 feet in height, is **granted**, subject to the following conditions:

1. Petitioner shall be bound by its testimony and exhibits of record, and by the testimony of its witnesses; and
2. Construction shall be in accordance with Exhibit Nos. 4 and 5 (inclusive).

Therefore, based upon the foregoing, on a motion by John H. Pentecost, Chair, seconded by Bruce Goldensohn, with Edwin S. Rosado, Vice Chair, and Stanley B. Boyd in agreement, and with Katherine Freeman opposed, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.


John H. Pentecost
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 21st day of December, 2017.


Barbara Jay
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book. Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.

See Section 59-7.3.2.G.1 of the Zoning Ordinance regarding the twelve (12) month period within which the variance granted by the Board must be exercised.